

# THE SOLUTION FOR JURISDICTIONAL CONFLICTS BETWEEN THE WTO AND RTAs: THE FORUM CHOICE CLAUSE

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*Jurisdictional conflicts between the WTO and RTAs are increasingly serious because of the proliferation of RTAs. Among suggestions to resolve these jurisdictional overlaps, the forum choice clause is considered by this article as an effective and fundamental method. When jurisdictional conflicts between the WTO and RTAs happen, the forum choice clause brings clarity and precision concerning how an appropriate forum to resolve these overlapping disputes is justified by WTO panels or its Appellate Body. Using case analyses and comparison of legal texts, this article considers two measures to offer a forum choice clause in WTO dispute settlement proceedings. One measure is to amend the WTO legal texts to provide WTO panels or its Appellate Body with the legal basis to apply forum choice clauses of RTAs. The other measure is to explicitly stipulate a forum choice clause in the WTO legal texts. This thesis puts great emphasis on how to implement these two measures and to settle pertinent obstacles.*

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## I. BACKGROUND

### A. Introduction

As the blossom of RTAs (Regional Trade Agreements) spreads around the world, the overlapping of regional trade systems with the WTO (World Trade Organization) is more and more serious. "As of 15 June 2014, some 585 notifications of RTAs (counting goods, services and accessions separately) had been received by the GATT/WTO. Of these, 379 were in force."<sup>2</sup> To some extent, these RTAs form a competitive relationship with the WTO. This competitive relationship causes RTAs to invest more resources into the development of their own RTAs and then reduces their enthusiasm for constructing the WTO. For

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2. *Regional Trade Agreements*, WORLD TRADE ORG. (Oct. 31, 2014), [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm).

instance, the EU (European Union) puts more knowledge and enthusiasm into its own EU laws rather than those of the WTO although the provisions of the WTO have already covered much of the substantive parts of the EU laws.<sup>3</sup> Bhagwati describes this kind of overlapping between the WTO and RTAs as “spaghetti bowl,” in order to indicate the chaos brought by this overlapping.<sup>4</sup> There is no effective rule to harmonize this overlapping. Article XXIV of GATT (General Agreement on Trade and Tariff) 1994 is obviously too narrow because it just focuses on the formation stage of RTAs.<sup>5</sup> However, the current situation is that many RTAs are already in the stage of “operating,” as opposed to merely being in a “formation” stage.<sup>6</sup>

Jurisdictional conflicts between the WTO and RTAs directly reflect one of many results brought about by the overlap between the WTO and the RTAs. More and more similar or even identical legal and factual claims are triggered before a variety of dispute settlement forums.<sup>7</sup> This

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3. See generally Joseph H. H. Weiler, *Cain and Abel, Convergence and Divergence in International Trade Law*, in *THE EU, THE WTO AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE* 1-4 (J. H. H. Weiler ed., Oxford Univ. Press Inc., New York, 2000).

4. JAGDISH BHAGWATI, *FREE TRADE TODAY* 112-13 (Princeton University Press 2002) (“Looking at this explosion when the number of PTAs was yet barely in three digits, I remarked that the situation was turning into a ‘spaghetti bowl’: a messy maze of preferences as PTAs formed between two countries, with each having bilaterals with other and different countries, the latter in turn bonding with yet others, each in turn having different rules of origin (as required by the preferences sought to be given and taken, without ‘leaks’ to non-members via entry into members) for different sectors, and so on. I called it a spaghetti bowl because it is an unruly mass of criss-crossing strings that, in any case, is beyond my capabilities.”); see also JAGDISH BHAGWATI & ANNE KRUEGER, *THE DANGEROUS DRIFT TO PREFERENTIAL TRADE AGREEMENTS* 2-3 (AEI Press 1995).

5. Colin Picker, *Regional Trade Agreements v. the WTO: A Proposal for Reform of Article XXIV to Counter This Institutional Threat*, 26 U. PA. J. INT’L ECON. L. 267, 287-94 (2005); see also Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT’L L.J. 419, 435-45 (2001); see generally Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging WTO Jurisprudence on RTAs*, 79 N.D. L. REV. 879 (2003).

6. See Cho, *supra* note 5, at 452.

7. See generally Yuval Shany, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (Oxford Univ. Press 2003).

phenomenon has been proved by many international cases, such as the *Mexico—Soft Drink* case, the *Argentina—Poultry* case and so on.<sup>8</sup> Because there are no forum choice clauses in the WTO covered agreements, the Appellate Body in the *Mexico—Soft Drink* case mentioned that “it [wa]s difficult to see how a panel would fulfill that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it.”<sup>9</sup> In the *Argentina—Poultry* case, the WTO Panel considered that there was no limitation on Brazil to “bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR,” also known as the Southern Common Market.<sup>10</sup> In both cases, the WTO DSB, also known as the Dispute Settlement Body, strongly upheld its jurisdictions although such disputes had already been settled in the forums of RTAs. The main reason is that there is no forum choice clause in the WTO legal texts.

Agreeing with Bhagwati, Pauwelyn describes this phenomenon as a “spaghetti bowl” which is cooking and points out that it became the focus as the standstill of the WTO Doha round faced with this issue.<sup>11</sup> Duplicate proceedings between the WTO and RTAs will induce many negative impacts on the settlement of these disputes. Firstly, the duplicative proceedings will cause considerable expense to those states involved because the states have to assume the cost for proceedings under both the WTO DSB and the RTA’s tribunal.<sup>12</sup> Secondly, if the duplicate proceedings are permitted and party does not satisfy the

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8. See, e.g., Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R (June 12, 2007) [hereinafter WT/DS332/R]; Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (Sept. 15, 2011) [hereinafter WT/DS381/R].

9. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 51, WT/DS308/AB/R (Mar. 6, 2006).

10. See Panel Report, *Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil*, ¶ 7.38, WT/DS241/R (Nov. 7 2001); MERCOSUR was founded in 1991 by Argentina, Brazil, Paraguay and Uruguay with the signature of the Treaty of Asuncion.

11. See generally Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO—NAFTA ‘Spaghetti Bowl’ is Cooking*, 9 J. INT’L ECON. L. 197 (2006).

12. Jennifer Hillman, *Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO do?*, 42 CORNELL INT’L L.J. 193, 202 (2009).

proceeding or the award of the original forum, the disputing party will choose another dispute settlement forum. This kind of forum shopping will threaten the authority of international tribunals.<sup>13</sup> Thirdly, duplicate proceedings will lead to double awards over the same dispute.<sup>14</sup> Then the disputing parties will find it difficult to implement the recommendations or rulings in those awards if those recommendations or rulings are contrary.<sup>15</sup>

#### B. Current Solutions regarding Jurisdictional Conflicts between the WTO and RTAs

Many international legal scholars and participants realize the issue of competition between multilateralism and regionalism.<sup>16</sup> Based on the influence of regionalism on the multilateralism, some scholars further notice jurisdictional conflicts between the WTO and RTAs therein and find out that there is no effective existing rule to settle these conflicts in current international trade system.<sup>17</sup> Generally speaking, the researches

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13. Joost Pauwelyn & Luiz Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT'L L.J. 77, 83 (2009).

14. Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, And Decentralization of Dispute Settlement In International Trade*, 27 UNIVERSITY OF PENNSYLVANIA J. OF INT'L ECON. L. 273, 287 (2006).

15. José Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEXAS INT'L L. J. 405, 416-19 (2003); *see also* WT/DS332/R, *supra* note 8.

16. Some selected literatures concerning competition between multilateralism and regionalism are listed as follows: *see* JEFFREY FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM (Inst. for Int'l Econ. 1997); ROBERT LAWRENCE, REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION (Brookings Inst. Wash., 1996); Chin Leng Lim, *Free Trade Agreements in Asia and Some Common Legal Problems*, in THE WTO IN THE TWENTY-FIRST CENTURY: DISPUTE SETTLEMENT, NEGOTIATIONS, AND REGIONALISM IN ASIA 434-56 (Yasuhei Taniguchi et al. eds., Cambridge Univ. Press 2007); N'gunu Tiny, *Regionalism and the WTO: Mutual Accommodation at the Global Trading System*, 11 INT'L TRADE L. & REG. 126 (2005); John Jackson, *Regional Trade Blocs and the GATT*, 16 THE WORLD ECONOMY 121 (1993).

17. The main literature regarding jurisdictional conflicts between the WTO and RTAs are listed as follows: *see also* Pauwelyn, *supra* note 11, at 197; Hillman, *supra* note 12, at 202; Caroline Henckels, *Overcoming Jurisdictional Isolationism at the*

investigating the competition between regionalism and multilateralism are abundant.<sup>18</sup> However, the literatures particularly concerning jurisdictional conflicts between the WTO and RTAs, especially those which suggest effective solutions for this kind of jurisdictional conflicts, are few.

According to the perception of this article, the research into the competition between multilateralism and regionalism sheds light on this study into resolving jurisdictional conflicts between the WTO and RTAs. The researches concerning the influence of current regionalism on the development of multilateralism reveal that the building block effect of RTAs on the WTO outweighs their stumbling block effect.<sup>19</sup> Such research provides this article with the precondition to discuss the solution for jurisdictional conflicts between the WTO and RTAs. This precondition is that RTAs need not to be forbidden or replaced by a solo WTO system, but a more effective mechanism must be established to harmonize their relationship. This kind of research also proves the ineffectiveness of Article XXIV of GATT 1994 in dealing with the matters brought about by regionalism.<sup>20</sup> Because of the insufficient rules in Article XXIV of GATT 1994 at this stage, there are no existing WTO

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*WTO—FTA Nexus: A Potential Approach for the WTO*, 19 EUR. J. INT'L L. 571 (2008); Joost Pauwelyn, *Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 MINN. J. GLOBAL TRADE 231 (2004) [hereinafter Pauwelyn, *Going Global, Regional, or Both?*]; Kyung Kwak & Gabrielle Marceau, *Conference on Regional Trade Agreements April 26, 2002, Overlaps and Conflicts of Jurisdiction between the WTO and RTAs*, WORLD TRADE ORG. (June 5, 2013), [http://www.wto.org/english/tratop\\_e/region\\_e/sem\\_april02\\_e/marceau.pdf](http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf); Karen Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL'Y 362, 363 (2006); Ernst-Ulrich Petersmann, *supra* note 14.

18. *Id.*

19. JOHN JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS, AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS* 314 (West Publ'g Corp. 3rd ed., 1995) (1977) [hereinafter JOHN JACKSON, *LEGAL PROBLEMS*]; *see also* PETER ROBSON, *THE ECONOMICS OF INTERNATIONAL INTEGRATION* 200 (George Allen & Unwin 2nd ed., 1984) (1980).

20. *See also* Picker, *supra* note 5; Cho, *supra* note 5; Hafez, *supra* note 5.

provisions to directly settle jurisdictional conflicts between the WTO and RTAs.<sup>21</sup>

Those few research articles concerning jurisdictional conflicts between the WTO and RTAs mainly refer to the phenomenon of jurisdictional conflicts between the WTO and RTAs nowadays, and then further touch on the solutions for these kinds of conflicts.<sup>22</sup> Some advise the WTO DSB to apply general principles of international law for the sake of settlement of jurisdictional conflicts between the WTO and RTAs, such as the *res judicata* principle, the comity principle, and the *forum non conveniens* principle.<sup>23</sup> Indeed, the *res judicata* principle is well recognized as a norm of international law for the settlement of jurisdictional conflicts.<sup>24</sup> The *MOX Plant* case shows that the comity is considered as the respect for the sovereignty and competence of another legal institution in the current public international law community.<sup>25</sup> The universal application of the *forum non conveniens* principle all around the world and its detailed reference in the Interim Text of the Hague Convention on Jurisdiction and Judgments<sup>26</sup> also reveal the possibility for the WTO panel or Appellate Body to apply such a principle to resolve its jurisdictional conflicts with RTAs.

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21. Songling Yang, *The Key Role of the WTO in Settling its Jurisdictional Conflicts with RTAs*, 11 CHINESE J. INT'L L. 281, 298 (2012).

22. See also Pauwelyn, *supra* note 11; Hillman, *supra* note 12; Henckels, *supra* note 17; Pauwelyn, *Going Global, Regional, or Both?*, *supra* note 17; Kwak & Marceau, *supra* note 17; Alter & Meunier, *supra* note 17; Petersmann, *supra* note 14.

23. See also Hillman, *supra* note 12, at 203; Henckels, *supra* note 17, at 584-85; Kwak & Marceau, *supra* note 17, at 8-9; Pauwelyn, *Going Global, Regional, or Both?*, *supra* note 17, at 289-95.

24. SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-1996*, at 1655-61 (M. Nijhoff 3d ed. 1997).

25. The *Mox Plant Case, Ireland v. United Kingdom*, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits, and Request for Further Provisional Measures, PCA ¶ 28 (June 24, 2003).

26. Hague Convention on Private International Law, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference, art. 22.1, June 20, 2011 (“[The] court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defense on the merits.”).



However, it is still practically possible that the WTO panel or Appellate Body would not like to apply these general principles of international law to decline “to exercise validly established jurisdiction” when the WTO’s jurisdiction conflicts with the counterpart of the RTA (Regional Trade Agreement).<sup>27</sup> The main reason is that those general principles of international law are not directly stipulated in the WTO legal texts. Then their application is not the compulsory obligation of the WTO panel or Appellate Body. Their application is the discretion of the WTO panel or Appellate Body. Currently there is no precedent that the WTO DSB applies these general principles of international law to settle its jurisdictional conflicts with RTAs.

Others even hold the same perception as this article that the WTO DSB should respect forum choice clauses of RTAs and apply them to resolve its jurisdictional conflicts with RTAs.<sup>28</sup> Although they suggest a useful method to resolve jurisdictional conflicts between the WTO and RTAs, such suggestions do not analyze in detail the preconditions and legal bases to apply the forum choice clauses of RTAs in the WTO dispute settlement process. This kind of suggestion mainly focuses on the contribution of the forum choice clause to the settlement of jurisdictional conflicts.

Although general principles of international law are considered by many present literary works as a convenient, faster and lower-cost way to settle jurisdictional conflicts between the WTO and RTAs, whether to apply those general principles is the direction of the WTO DSB (Dispute Settlement Body).<sup>29</sup> If the WTO DSB insists on its own jurisdiction and refuses to apply those principles, jurisdictional conflicts between the WTO and RTAs will still happen. In other words, uncertainty still exists

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27. See WT/DS308/AB/R, *supra* note 9, at ¶ 51; see also Panel Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, ¶ 7.4-7.9 (Mar. 16, 2004).

28. Henry Gao & Chin Leng Lim, *Saving the WTO from the Risk of Irrelevance: the WTO Dispute Settlement Mechanism as a ‘Common Good’ for RTA Disputes*, 11 J. INT’L ECON. L. 899, 906 (2008); see also Kwak & Marceau, *supra* note 17, at 6; see also Pauwelyn, *Going Global, Regional, or Both?*, *supra* note 17, at 287-89.

29. Hillman, *supra* note 12, at 202; see also Henckels, *supra* note 17, at 584-85; see also Kwak and Marceau, *supra* note 17, at 8-9; see also Pauwelyn, *Going Global, Regional, or Both?*, *supra* note 17, at 289-95.



when applying general principles to settle jurisdictional conflicts between the WTO and RTAs as suggested by many current literary works.<sup>30</sup> In order to settle this uncertainty, Section 2 of this article will first explain why the forum choice clause should be considered here as the fundamental and better solution to jurisdictional conflicts among the given suggestions.

In Sections 3 and 4 of this article the possibility and the legal basis for the WTO DSB to apply a forum choice clause will be analyzed in detail. In these two sections, how a forum choice clause is absorbed into WTO dispute settlement proceedings will also be discussed. As mentioned in the paragraph above, these analyses seldom appear in the former literature, which advises the WTO DSB to apply forum choice clauses.<sup>31</sup> This article focuses on how to implement the given advice and settle the pertinent obstacles.

## II. THE FUNDAMENTAL SOLUTION: THE FORUM CHOICE CLAUSE

As the discussion above, this section will analyze why the forum choice clause could fundamentally settle jurisdictional conflicts between the WTO and RTAs compared with other suggestions. To begin with, this section will exhibit what is the forum choice clause.

### A. The Forum Choice Clause

In order to avoid jurisdictional conflicts between the WTO and RTAs, many RTAs already have their own rules for resolving jurisdictional conflicts, such as their forum choice clauses.<sup>32</sup> According to the opinion

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30. *Id.*

31. *Id.*

32. *See, e.g.*, Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation between the Association of Southeast Asian Nations and the People's Republic of China, ASEAN-China, art. 2.6, 2004, available at <http://www.asean.org/communities/asean-economic-community/item/agreement-on-dispute-settlement-mechanism-of-the-framework-agreement-on-comprehensive-economic-co-operation-between-the-association-of-southeast-asian-nations-and-the-people-s-republic-of-china-5> ("Once dispute settlement proceedings have been initiated

of this article, these forum clauses could be utilized by the WTO panel or Appellate Body to settle jurisdictional conflicts between the WTO and RTAs. In order to design a forum choice clause in the WTO legal texts, the WTO could also use the structure and contents of these clauses for reference.

The forum choice clause of a particular RTA usually allows the settlement of a dispute either in its own forum or in any other forum at the discretion of the complaining party, such as the NAFTA (North American Free Trade Agreement), Chile-Mexico Free Trade Agreement and so on. In order to avoid jurisdictional overlap, some of those forum choice clauses are further transformed into exclusive forum clauses, in addition to the choice of forum clause. For instance, Israel-US (United States) Free Trade Agreement stipulates that “[i]f the conciliation panel under this Agreement or any other applicable international dispute settlement mechanism has been invoked by either Party with respect to any matter, the mechanism invoked shall have exclusive jurisdiction over that matter.”<sup>33</sup> The Article 2.6 of Agreement on DSM (Dispute Settlement Mechanism) of ACFTA (Association of Southeast Asian Nations and China Free Trade Area) also has the similar stipulation.<sup>34</sup>

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under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising under the Framework Agreement or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.”); *see also* Agreement on the Establishment of A Free Trade Area between the Government of Israel and the Government of the United States of America, U.S.-Isr., art. 19.1.f, Apr. 22, 1985, *available at*

[http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005439.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005439.asp).

33. *Id.*

34. Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Co-Operation between the Association of Southeast Asian Nations and the People’s Republic of China, ASEAN-China, art. 2.6, 2004, *available at* <http://www.asean.org/communities/asean-economic-community/item/agreement-on-dispute-settlement-mechanism-of-the-framework-agreement-on-comprehensive-economic-co-operation-between-the-association-of-southeast-asian-nations-and-the-people-s-republic-of-china-5> (“Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such parties arising under the Framework Agreement or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.”).

However, there are no forum choice clauses in the WTO legal texts. The WTO endows its judicial body with full jurisdiction on matters raised in its covered agreement.<sup>35</sup> This condition could be reflected from the Article 1 of the WTO DSU (Understanding on Rules and Procedures Governing the Settlement of Disputes) concerning the coverage and application of the DSU,<sup>36</sup> and Article 7 of the WTO DSU regarding terms of reference for the WTO panel.<sup>37</sup> This condition is further emphasized by Article 23<sup>38</sup> and the Appendix 1 of the DSU.<sup>39</sup>

35. Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401, art. 1, 7, 23 and Appendix 1 [hereinafter DSU].

36. *Id.* art. 1.1 (“The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the ‘covered agreements’). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the ‘WTO Agreement’) and of this Understanding taken in isolation or in combination with any other covered agreement.”).

37. *See id.* art. 7.1, 7.2 (“Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: ‘To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document . . . and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).’ Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.”).

38. *See id.* art. 23 (“When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.”).

39. *See id.* Appendix 1:

(A) Agreement Establishing the World Trade Organization

(B) Multilateral Trade Agreements

Annex 1A: Multilateral Agreements on Trade in Goods

Annex 1B: General Agreement on Trade in Services

Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights

Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes

Because there are no forum choice clauses in the WTO legal texts, the WTO DSB strongly upheld its jurisdictions although the same disputes had already been settled in the forums of RTAs. This is evidenced by the practical cases of jurisdictional conflicts as mentioned in Section I(A) of this article. However, tribunals under the RTAs' DSMs will not receive the case again when those cases are already settled by the WTO DSB. The reason is that such re-litigations under the RTAs' DSMs will violate their own forum choice clauses. Their exclusive forum choice clauses do not permit the action of re-litigations. Unfortunately, there are no rules under the WTO system to deal with jurisdictional conflicts between the WTO and RTAs.<sup>40</sup> Therefore, the main causation for jurisdictional conflicts between the WTO and RTAs is the lack of forum choice clause in the WTO legal texts.

### B. The Fundamental Method

Because the WTO lacks effective pertinent rules to resolve its jurisdictional conflicts with RTAs, many argue that general principles of international law concerning the matter of jurisdictional conflicts seem to be the most suitable solution.<sup>41</sup> These principles include *res judicata* principle, comity principle, and *forum non conveniens* principle. Indeed, the WTO DSB is able to utilize the general principles of international

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#### (C) Plurilateral Trade Agreements

Annex 4:

Agreement on Trade in Civil Aircraft

Agreement on Government Procurement

International

Dairy

Agreement

International Bovine Meat Agreement

The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB).

40. See notes 35-39.

41. See note 29.

law as the complement of its legal texts to settle its jurisdictional conflicts with RTAs.<sup>42</sup> As mentioned in Section I(B), whether to apply those general principles is in the discretion of the WTO DSB.<sup>43</sup> It is not a compulsory obligation in the WTO legal text. Therefore, it is possible that the WTO DSB refuses to apply these general principles of international law.

In order to fundamentally resolve jurisdictional conflicts between the WTO and RTAs, the WTO should fully realize the binding effect of sources of international law. Consequently, the WTO should amend its legal texts to pay more attention to the post-formative “operation” of RTAs under the WTO and not just the “formation” stage.<sup>44</sup> According to the perception of this article, the amendment of the WTO legal texts to offer WTO panels or its Appellate Body a forum choice clause in WTO dispute settlement proceedings is the fundamental method to settle jurisdictional conflicts between the WTO and RTAs. The following analysis will prove why this amendment is the fundamental method.

### *1. The Equal Hierarchy between RTAs' agreements and WTO legal texts*

Theoretically, there is no formal “hierarchy of sources” in current international law.<sup>45</sup> There is no uniform hierarchy among different sources of international law, which allows various international tribunals to apply those different sources of international law, formally and legally speaking, in “clinical isolation.”<sup>46</sup> Currently, the sources of international law reveal a variety of kinds of fragmentation. This fragmentation is reflected from “the lack of centralized organs, specialization of law, different structures of legal norms, parallel regulations, competitive

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42. See Yang, *supra* note 21, at 305.

43. See note 29.

44. See Cho, *supra* note 5, at 452; see also Hafez, *supra* note 5.

45. JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 94 (2003) [hereinafter CONFLICT OF NORMS].

46. See Gabrielle Marceau, *A Call for Coherence in International Law—Praises for the Prohibition Against ‘Clinical Isolation’ in WTO Dispute Settlement*, 33 J. WORLD TRADE 87, 115-52 (1999).

regulations, an enlargement of the scope of international law, and different regimes of secondary rules.”<sup>47</sup>

Some may argue that the Article 38 of the ICJ Statute lists the hierarchy of different sources of international laws and is able to regulate conflicts of legal norms at the international level; however, many scholars oppose this.<sup>48</sup> The traditional sources of international law, treaty, customary law and general principles of law, listed in Paragraphs 1(a) to (c) of Article 38 of the ICJ Statute,<sup>49</sup> are not considered to have established any a priori hierarchy.<sup>50</sup> Brownlie points out that sources in Article 38 “are not stated to represent a hierarchy, but the draftsmen intended to give an order and in one draft the word ‘successively’ appeared.”<sup>51</sup> The order of sources in Article 38 just shows the logical

47. Christian Leathley, *An Institutional Hierarchy to Combat The Fragmentation of International law: Has The ILC Missed An Opportunity?*, 40 N.Y.U. J. INT’L L. & POL. 259, 262-63 (2007).

48. CONFLICT OF NORMS, *supra* note 45; Michael Akehurst, *The Hierarchy of the Sources of International Law*, in 47 (1) BRITISH YEAR BOOK OF INT’L L. 1974-1975, at 273, 274.

49. Statute of the International Court of Justice art. 38 (1946):

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.”).

*Id.*

50. *See id.*; *see also* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L., 291, 291 (2006).

51. John K. Setear, *Responses to Breach of A Treaty and Rationalist International Relations Theory: the Rules of Release and Remediation in the Law of*

sequences of the appearance of these sources in the judge's mind and Article 38 would not hope to set up a certain hierarchy for these sources in the international arena.<sup>52</sup>

The basic reason for no formal hierarchy among sources of international law is that "[i]nternational law, unlike domestic legal system[s], is 'decentralized' in that it has no central legislator creating the rules" and "the prime *creators* of international law are also the main *subjects* of international law, namely, states."<sup>53</sup> The international society must respect the intention of states. Indeed, "international law is a law of co-operation, not subordination," and as "all norms essentially derive from the same source (state consent), it is presumed that they have the same binding value."<sup>54</sup> All states are in equal status and it is hard to conclude that agreements among RTA members have less binding value effect than WTO legal texts. They are all agreements of states and should be equal respected.

Therefore, forum choice clauses of RTAs and the jurisdictional clause of the WTO are in the same hierarchy, it is hard to judge which one owns the priority when they conflict with each other. There is no "all-encompassing umbrella jurisdiction" to deal with the growth of international judiciary.<sup>55</sup> The only rule under this circumstance is the *pacta sunt servanda* (agreements must be kept) principle.<sup>56</sup> It means that the WTO DSB should obey its own legal texts and tribunals under RTAs should also follow their own treaty obligation. Faced with this kind of difficulty, it is better to apply a forum choice clause in WTO dispute settlement proceedings. Then the WTO DSB is able to justify which jurisdiction, either that of the WTO or the RTA, owns priority when jurisdictional conflicts between the WTO and RTAs happen.

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*Treaties and the Law of State Responsibility*, in 83 VIRGINIA LAW REVIEW 1, n. 203 (1997).

52. Akehurst, *supra* note 48.

53. See CONFLICT OF NORMS, *supra* note 45, at 95.

54. See *id.*

55. See Leathley, *supra* note 34, at 267.

56. See CONFLICT OF NORMS, *supra* note 45, at 327.



## 2. Preference for Treaties

Although there is no hierarchy existing among different sources of international law theoretically, “in operational terms, a certain hierarchy between the sources can be detected—treaties normally prevailing over custom which should, in turn, prevail over general principles of law—this hierarchy cannot be generali[s]ed.”<sup>57</sup> The opinions supporting the existence of a practical hierarchy in international law are increasing recently.<sup>58</sup> Article 38(1) of the Statute of the ICJ does not clearly elevate the hierarchy of different sources of international laws, but it does provide a quasi-hierarchical list and considers treaty preference in its list order.<sup>59</sup>

From the practical aspect, the Article 38(1) of the Statute of the ICJ shows the different functions of those sources in international judges or arbitrators’ minds although there is no hierarchy among them in theoretical aspects. International tribunals prefer treaties, such as multilateral agreements, because treaties clearly reflect the agreement of their member states and precisely define their rights and obligations.<sup>60</sup> For instance, the ICJ prefers to depend on “a practice clearly established between two States, which was accepted by the Parties as governing the relations between them” and “attribute decisive effect to” it in order to justify the specific rights and obligations between these states.<sup>61</sup>

General principles of international law are usually a *secondary* source of international law except those belonging to *jus cogens*.<sup>62</sup> The intended

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57. See *id.* at 147.

58. See, e.g., Joseph Weiler & Andreas Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, 8 EUR. J. INT’L L. 545 (1997).

59. Juliana Murray, *Assessing Allegations: Judicial Evaluation of Testimonial Evidence in International Tribunals*, 10 CHI. J. INT’L L. 769, 771 (2010).

60. John McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT’L L. 229, 239 (2003).

61. *Right of Passage over Indian Territory (Port. v. India)*, 1960 I.C.J. 44, 233 (Apr. 12).

62. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 393-94 (1953).

functions for general principles of law are mainly “filling gaps left open by treaty and custom with the objective of avoiding a *non liquet*.”<sup>63</sup> Compared with customs and general principles of law, the content of treaties is less uncertain and more easily applied by the international tribunals. The WTO legal text is the convention of all its member states and it is the treaty in nature. The WTO panel or Appellate Body will prefer to justify the dispute before it based on the WTO legal texts.

Consequently, the amendment of the WTO legal texts, which offers WTO panels or its Appellate Body a forum choice clause in WTO dispute settlement proceedings, is highly recommended in this article. It is considered by this article as a fundamental method to resolve jurisdictional conflicts between the WTO and RTAs. This method ensures that the forum choice clause becomes the legal basis of settlement of jurisdiction conflicts between the WTO and RTAs. However, whether to apply pertinent general principle of international law to settle these jurisdictional conflicts is the discretion of the WTO DSB.

### C. The Precondition for Applying Forum Choice Clause in WTO Dispute Settlement Proceedings

According to the analysis below, there are two ways to offer the WTO panel or its Appellate Body a forum choice clause in WTO dispute settlement proceedings. One method is to offer the WTO DSB legal basis to apply RTAs’ forum choice clauses. The other is to stipulate a forum choice clause in the WTO legal texts. These two methods will be discussed in detail in the section 3 and section 4 respectively and not be analyzed here. The emphasis here is the precondition for applying forum choice clauses in WTO dispute settlement proceedings. The precondition focuses on how to define the “same dispute” involved in the cases of overlapping jurisdictions. It is the “same dispute” that brings about the issue of overlapping jurisdictions and the forum choice clause is designed to avoid initiating different dispute settlement proceedings regarding the “same dispute.”

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63. CONFLICT OF NORMS, *supra* note 45, at 129.

There are some debates concerning the “same dispute” if disputes are claimed under different arbitral tribunals.<sup>64</sup> Traditionally, claims triggered under different agreements constitute different grounds. However, it should be noticed that such different grounds may be artificial when those grounds refer to the same legal obligation.<sup>65</sup> In the *Southern Bluefin Tuna* case, the UNCLOS (United Nations Convention on the Law of the Sea) tribunal stated:

[T]he Parties to this dispute ... [wer]e the same Parties grappling not with two separate disputes but with what in fact [wa]s a single dispute arising under both Conventions. To find that, in this case, there [wa]s a dispute actually arising under UNCLOS which [wa]s distinct from the dispute that arose under the CCSBT would be artificial.<sup>66</sup>

Currently, many scholars and experts prefer the method that examines the underlying nature of a dispute but not just its formal classification.<sup>67</sup> This fulfills the practical situation in international society. Different international tribunals have their respective agreements towards the same dispute, such as the fact that many RTAs have rules about national treatment. If claims under different agreements constitute different disputes, the forum choice clauses of RTAs will become meaningless.

For example, US-Israel FTA (Free Trade Agreement) states that if the dispute settlement panel under the agreement or any other international dispute settlement mechanism is invoked with respect to any matter, the mechanism shall have exclusive jurisdiction over that matter.<sup>68</sup> The matter mentioned in the forum choice clause of US-Israel FTA obviously refers to the issue between the same disputing parties regarding their same benefit involved. Although the same disputing parties will pursue

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64. FRANÇOIS-XAVIER TRAIN, *LES CONTRATS LIÉS DEVANT L'ARBITRE DU COMMERCE INTERNATIONAL* 458-60, 470 (L.G.D.J. ed., 2003).

65. INTERIM REPORT: “*RES JUDICATA*” AND ARBITRATION 20 (2004), *available at* <http://www.ila-hq.org/en/committees/index.cfm/cid/19> [hereinafter INTERIM REPORT].

66. *Southern Bluefin Tuna* (Austl. and N.Z. v. Japan), Award of Jurisdiction and Admissibility, ¶ 54 (Aug. 4, 2000), *available at* [http://legal.un.org/riaa/cases/vol\\_XXIII/1-57.pdf](http://legal.un.org/riaa/cases/vol_XXIII/1-57.pdf).

67. August Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 LAW PRAC. INT’L CTS. & TRIB. 37, 71 (2004).

68. *See* Free Trade Agreement, U.S.-Isr., Aug. 19, 1985.

relief concerning the same issue under different dispute settlement forums, it does not mean that these disputes in different forums are not the same ‘matter’ as mentioned in the forum choice clause of US-Israel FTA.

The same dispute could be expansively interpreted that “a similar situation exists between identical parties in relation to related legal relationships.”<sup>69</sup> Many bilateral and multilateral courts or tribunals have already adopted the method that examines the underlying nature of a dispute but not merely its formal classification. For instance, the judgment in the *Genocide* case softened the three triple identity test for *res judicata* by concluding the *res judicata* effect of the judgment based on the Genocide Convention although the new dispute depended on different grounds.<sup>70</sup> Form current international practices, the forum choice clause is effective “when a claimant brings claims against the same respondent arising out of the same factual situation before different” international dispute settlement forums.<sup>71</sup>

### III. THE APPLICATION OF RTAS’ FORUM CHOICE CLAUSES IN WTO DISPUTE SETTLEMENT PROCEEDINGS

According to the former analysis, the better measure to resolve jurisdictional conflicts between the WTO and RTAs is to offer a forum choice clause in WTO dispute settlement proceedings. Many RTAs have already stipulated forum choice clauses, which could fill the void aspect of the WTO rules on jurisdictional conflicts between the WTO and RTAs. Therefore, one method is to amend the WTO legal texts as to allow the WTO DSB to apply RTAs’ forum choice clauses. Some scholars support this argument that the best solution for jurisdictional conflicts between international courts or tribunals is to apply the explicit forum choice clause of disputants themselves, such as those already stipulated in RTAs.<sup>72</sup> Indeed, many RTAs already have rules concerning

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69. See INTERIM REPORT, *supra* note 65, at 3-4.

70. See Stephen Wittich, *Permissible Derogation from Mandatory Rules? The Problem of Party Status in the Genocide Case*, 18 EUR. J. INT’L L. 591, 604-05 (2007).

71. See INTERIM REPORT, *supra* note 65, at 4.

72. See Pauwelyn & Salles, *supra* note 13, at 91.

jurisdictional conflicts although there still are none in the legal texts of WTO. If the WTO DSB is able to apply the forum choice clauses in RTAs, the problem of jurisdictional conflicts will be easily resolved.

A. The Advantage and Challenge to Apply RTAs' Forum Choice  
Clauses in WTO Dispute Settlement Proceedings

1. *The Advantage*

If the WTO panel or Appellate Body is not able to utilize the forum choice clauses in RTAs, the problem comes just as the *US—Tuna II* case between the US and Mexico. “On 9 March 2009, Mexico requested the establishment of a [WTO] panel” with respect to certain measures taken by the United States concerning the importation, marketing and sale of tuna and tuna products.<sup>73</sup> The DSB established a panel on April 20, 2009. On November 5, 2009, “the United States ha[d] requested [NAFTA] dispute settlement consultations with Mexico regarding Mexico’s failure to move its ‘dolphin safe’ labeling dispute from the [WTO] to the NAFTA, as requested by the United States and as required by Article 2005 of the NAFTA.”<sup>74</sup> According to the perception of the United States, “dolphin safe” labeling dispute related to the “protection of human, animal or plant life or health, or the environment.”<sup>75</sup> Consequently, this dispute should be settled exclusively in the DSM of the NAFTA as provided under the Article 2005.4 of the NAFTA.<sup>76</sup>

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73. WT/DS381/R, *supra* note 8.

74. Press Release, Office of the United States Trade Representative, United States Initiates NAFTA Dispute with Mexico over Mexico’s Failure to Move Its Tuna-Dolphin Dispute from the WTO to the NAFTA (Nov. 2009), *available at* <http://www.ustr.gov/about-us/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over>.

75. WT/DS381/R, *supra* note 8.

76. See U.S.-Isr. Free Trade Agreement, *supra* note 68, 4(a) (“In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures): (a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment[] . . . where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in

However, Mexico failed to either take any steps to appoint a dispute panel in the NAFTA DSM or agree to move the WTO case to the NAFTA. The United States also did not invoke exclusive forum choice clause enshrined in Article 2005.4 of the NAFTA to ask the WTO panel or Appellate Body to decline proceeding to the merits. Both the WTO panel and Appellate Body in this case did not consider the issue of overlapping jurisdictions and their reports were circulated to Members.<sup>77</sup> This dispute was finally settled by the agreement between the United States and Mexico that “the reasonable period of time for the United States to implement the DSB recommendations and rulings shall be 13 months.”<sup>78</sup>

Unlike the argument of Argentina in the *Argentina—Poultry* case, the United States did not insist the Article 2005.4 of the NAFTA as a possible defense during the WTO dispute settlement proceeding. In the *Argentina—Poultry* case, Argentina, of course, opposed the WTO Panel’s exercise of jurisdiction in its preliminary argument and requested that “in light of the prior MERCOSUR proceedings, the Panel refrain[ed] from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings.”<sup>79</sup> “[T]he MERCOSUR Protocol of Olivos . . . allow[ed] MERCOSUR members to choose the forum in which they wish disputes to be settled, with the restriction constituted by the exclusion clause . . . once a procedure ha[d] been initiated in one forum, this precludes resorting to other forums provided [for] in the Protocol.”<sup>80</sup>

Therefore, the attitude of the WTO panel or Appellate Body towards forum choice clauses of RTAs is not revealed in the recent *US—Tuna II* case. The strong attitude of the WTO DSB towards its own jurisdiction, reflect in the *Mexico—Soft Drink* case, the *Argentina—Poultry* case, is not changed and will attenuate the effect of forum choice clauses under

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respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.”).

77. See generally WT/DS381/R, *supra* note 8; see also Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (May 16, 2012).

78. DISPUTE DS381, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm).

79. WT/DS241/R, *supra* note 10, at ¶ 7.17.

80. *Id.* ¶ 7.29.

RTAs' DSMs when jurisdictional conflicts occur. The Appellate Body in the *Mexico—Soft Drink* case was of the opinion that settling an established dispute under its jurisdiction is part of the panel's obligations according to the relevant provisions of the DSU.<sup>81</sup> A disputant who triggers a procedure under the WTO DSB has the right to be "entitled to a ruling by a WTO panel."<sup>82</sup> In the *Argentina—Poultry* case, the WTO Panel held that "there [was] no basis for a WTO panel to apply the principle of estoppel."<sup>83</sup>

If the amendment of the WTO legal texts adds a new clause to allow the WTO panel or Appellate Body to apply forum choice clauses of RTAs, the current dilemma of the WTO panel or Appellate Body regarding overlapping jurisdictions between the WTO and RTAs will be avoid. This new clause will "justify the Panel declining to exercise its jurisdiction" in the case of overlapping jurisdictions.<sup>84</sup> According to the new clause, the WTO panel or Appellate Body will not endow its judicial body with full jurisdiction on matters raised in its covered agreements.<sup>85</sup> The DSM of a particular RTA will be the possible dispute settlement forum if the WTO panel or Appellate body justify the jurisdiction of that RTA based on the new clause in the WTO legal texts. The WTO panel or Appellate Body will consider the issue of overlapping jurisdictions on this new clause because the issue of overlapping jurisdictions falls into the category stipulated by this new clause and both this new clause and the current DSU are the WTO legal texts.

## 2. The Challenge

However, the utilization of RTAs' forum choice clauses by the WTO DSB will be challenged by the argument that the jurisdiction of the WTO is textually limited to disputes arising from WTO covered agreements.<sup>86</sup>

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81. See WT/DS308/AB/R, *supra* note 9, at 17-18, 19-21.

82. See *id.* ¶ 52.

83. See WT/DS241/R, *supra* note 10, at 21 n.58.

84. See WT/DS308/AB/R, *supra* note 9, at ¶ 4.

85. Marrakesh Agreement Establishing the World Trade Organization, art. II, 1867 U.N.T.S. 154.

86. See generally Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).



This argument is reflected from the WTO DSB practice in the *India—Patents* case that “[a]lthough panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU . . . . Nothing in the DSU gives a panel the authority either to disregard or to modify . . . explicit provisions of the DSU.”<sup>87</sup>

It seems that a WTO panel or its Appellate Body is not able to decide a particular case based on the substantive stipulation of RTAs, such as their forum choice clauses. Some scholars also consider that the jurisdiction of the WTO DSB is limited to the covered agreement under the WTO.<sup>88</sup> Although there are critiques about the application of RTAs’ forum choice clauses in WTO dispute settlement proceeding, the article holds the perception that these critiques will not become the obstacle to the amendment of the WTO legal texts proposed in this article. The detailed reason is analyzed as following.

Firstly, “the fact that the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered agreements.”<sup>89</sup> In Pauwelyn’s view, it is better to distinguish the legal basis of disputes from the law applied to settle disputes.<sup>90</sup> He further points out that “DSU Arts. 3.2 and 19.2 do not address the jurisdiction of panels nor the applicable law that a panel can apply to a particular dispute” and these articles do not “proclaim that WTO covered agreements must necessarily and always prevail over all past and future law.”<sup>91</sup> The stipulations of the WTO do not prohibit its panels or Appellate Body from applying non-WTO rule to settle disputes. The last sentence of Article 3.2 of the DSU<sup>92</sup> indicates that it merely deals with

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87. Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, ¶ 92, WT/DS50/AB/R (Dec. 19, 1997) [hereinafter WT/DS50/AB/R].

88. Joel B. Trachtman, *Book Review: Conflict of Norms in Public International Law* by Joost Pauwelyn, 98 AM. J. INT’L L. 855, 858 (2004).

89. See CONFLICT OF NORMS, *supra* note 45, 460.

90. *Id.*

91. *Id.* at 353.

92. See Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 35, at art. 3.2 (“The dispute settlement system of the WTO is a

the interpretative function of panels, not with the applicable law before a panel, nor with conflict of norms.<sup>93</sup> These articles do not mean that WTO panels and its Appellate Body are unable to resolve their dispute based on non-WTO rules, which are beneficial to the problem solving.

Then, the WTO Appellate Body itself also notice that “[p]anels are inhibited from addressing legal claims falling outside their terms of reference,” but “nothing in the DSU limits the faculty of a Panel freely to use arguments submitted by any of the parties—or to develop its own legal reasoning—to support its own findings and conclusions on the matter under its consideration.”<sup>94</sup> This article holds the same perception that WTO panels have extensive discretion powers to apply arguments of disputing parties, especially when there are unclear or no pertinent rules about disputing matters in the WTO legal texts.<sup>95</sup> Accordingly, forum choice clauses of RTAs can be utilized to support the findings and conclusions of the WTO panel or Appellate Body if these clauses are “submitted by any of the parties.”<sup>96</sup>

Practically, Argentina submitted the forum choice clause under Protocol of Olivos as its argument in the *Argentina—Poultry* case.<sup>97</sup> The WTO Panel in this case indeed considered the argument of Argentina and did not ignore the validity of the forum choice clause of the MERCOSUR.<sup>98</sup> However, the WTO Panel did not rely on this forum choice clause to assess the case because this forum choice clause had “not yet entered into force” when this dispute happened.<sup>99</sup> According to

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central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”).

93. See CONFLICT OF NORMS, *supra* note 45, at 353.

94. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, ¶ 156, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

95. Marrakesh Agreement Establishing the World Trade Organization, art. II, 1867 U.N.T.S. 154.

96. *Id.*

97. See WT/DS241/R, *supra* note 10, at ¶ 7.37.

98. WT/DS241/R, *supra*, note 10.

99. See *id.* ¶ 7.38.

the attitude of the WTO Panel in this case, forum choice clauses of RTAs will possibly be utilized to settle the issue of overlapping jurisdictions by WTO panels if they have already entered into force.

Finally, the jurisdictions of WTO panels or its Appellate Body are not influenced when WTO panels and its Appellate Body refuse to settle a dispute based on forum choice clauses of RTAs. Under this circumstance, it only means that WTO panels and its Appellate Body do not directly make a finding on the merits of disputes by themselves. In fact, the WTO panel or its Appellate Body can rely on the decisions of RTAs' DSMs to "make an objective assessment of the matter before it."<sup>100</sup> If WTO panels and its Appellate Body satisfy the decisions of RTAs' DSM, they can accept those decisions. If tribunals of RTAs do not settle the disputes or the WTO panels and its Appellate Body consider the awards of RTAs' tribunals to be contrary to the WTO legal texts, the disputes can still be resolved by the WTO DSB. Therefore, WTO panels and its Appellate Body are not deprived of its jurisdiction, and they actually have already exercised their jurisdictions as mentioned above although they abstain from "making any finding on the matter" before them.<sup>101</sup>

Generally speaking, the WTO panel or Appellate Body does not "disregard or to modify ... explicit provisions of the DSU"<sup>102</sup> when WTO panel or the Appellate Body refuses to settle a dispute based on forum choice clauses of RTAs. Under this circumstance, the WTO panel or the Appellate Body does not give up its jurisdiction as stipulated in the DSU. Hence, the proposal to allow the WTO panel or Appellate Body to apply RTAs' forum choice clauses does not violate the DSU.

#### B. The Legal Bases for Applying Forum Choice Clauses of RTAs in WTO Dispute Settlement Proceedings

The above section, Section III(A)(2), has proved that the applicable law is not necessarily limited to the WTO legal texts when the WTO

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100. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 35, at art. 2.1.

101. See WT/DS308/AB/R, *supra* note 9, at ¶ 51.

102. WT/DS50/AB/R, *supra* note 87, at ¶ 92.

DSB settles its jurisdictional conflicts with RTAs. The DSU is not violated when WTO panel or Appellate Body applies RTAs' forum choice clauses to settle jurisdictional conflicts between the WTO and RTAs. This section will further analyze the legal bases to apply forum choice clauses of RTAs in WTO dispute settlement proceedings.

### *1. Lex Posterior*

The *lex posterior* principle is one of the legal bases to apply forum choice clauses of RTAs in WTO dispute settlement proceedings. Article 30.3 and 30.4 of the VCLT (Vienna Convention on the Law of Treaties) has established the *lex posterior* principle to resolve conflict of treaties.<sup>103</sup> Article 30.3 and 30.4 of the VCLT points out that:

3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) As between States Parties to both treaties the same rule applies as in paragraph 3;

(b) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.<sup>104</sup>

Article 30.3 and 30.4 are effective when the Article 41<sup>105</sup> of the VCLT is not violated.

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103. See generally Claude Chase, *Norm Conflict Between WTO Covered Agreements—Real, Apparent or Avoided?*, 61 INT'L & COMP. L.Q. 791 (2012); see also Isabel Feichtner, *The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests*, 20 EUR. J. INT'L L. 615, 629 (2009); see also CONFLICT OF NORMS, *supra* note 45, at 361.

104. Vienna Convention on the law of Treaties, art. 30.3, 30.4, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

Some RTAs are concluded after member states of these RTAs become WTO members. Under this circumstance, the RTAs, including their forum choice clauses, have priority over the WTO legal texts according to the *lex posterior* principle. For instance, the DSM of the ACFTA stipulates its forum choice clauses after the member states of the DSM of the ACFTA become WTO members.<sup>106</sup> Its forum choice clause therefore fulfills the first condition for applying Article 30.3 and 30.4 of the VCLT, that the conflicting treaties are successive in time. The WTO legal texts are earlier treaties and these RTAs' forum choice clauses are the later treaties within the meaning of the Article 30.3 and 30.4 of the VCLT.

Then, the forum choice clauses of RTAs and the jurisdiction clauses of the WTO relate to the same subject matter, which is the necessary requirement for the application of the *lex posterior* principle. RTA's forum clauses and pertinent Articles of the DSU, its Article 1, 3.2 and 7.3, all concern the same subject-matter, that the jurisdiction towards a particular dispute. The same subject matter is the precondition for the

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105. See *id.* art. 41.

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) The possibility of such a modification is provided for by the treaty; or

(b) The modification in question is not prohibited by the treaty and:

(i) Does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) Does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

106. See Agreement on Dispute Settlement Mechanism of the Framework Agreement on Comprehensive Economic Operation Between the Association of Southeast Asian Nations and the People's Republic of China, art. 1.1.

effective Article 30.3 and 30.4 of the VCLT.<sup>107</sup> The WTO Panel in *India—Autos* case accepted this necessary requirement.<sup>108</sup>

Furthermore, forum choice clauses involved in the RTAs are also permitted by the Article XXIV of GATT 1994. Those 379 RTAs<sup>109</sup> in force under the WTO fulfill the requirement of the Article XXIV of GATT 1994 if their clauses are not claimed to be violated and accepted by the CRTA (Committee on Regional Trade Agreements).<sup>110</sup> The Article XXIV of GATT 1994 allows for the existence of those RTAs which focus on trade creation,<sup>111</sup> minimize trade diversion,<sup>112</sup> and involve substantially all trade activities among their members.<sup>113</sup> The Article XXIV of GATT 1994 and its Understanding provide the standard for judging whether RTAs are legally established.

If the establishment of a particular RTA is compliant with the Article XXIV of GATT 1994 and its Understanding, the forum choice clause involved into the legal text of that RTA will not be prohibited by the WTO. It means that the RTA's forum choice clause is "provided for" or "not prohibited" by the WTO legal texts and not "incompatible with the effective execution of the object and purpose" of GATT 1994 as required in the Article 41 of the VCLT.<sup>114</sup> In order to enforce the RTA norms, members of a WTO-comparable RTA would be justified in utilizing the RTA's dispute settlement mechanism, including its forum choice clause.

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107. See VCLT, *supra* note 104, at art. 30.1 ("1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.").

108. See Appellate Body Report, *India—Measures Affecting the Automotive Sector*, ¶ 9, WT/DS146/R, WT/DS175/R (Mar. 19, 2002).

109. *Regional trade agreements*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/region\\_e/region\\_e.htm](http://www.wto.org/english/tratop_e/region_e/region_e.htm) (last visited June 5, 2013).

110. *Work of the Committee on Regional Trade Agreements*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/tratop\\_e/region\\_e/regcom\\_e.htm](http://www.wto.org/english/tratop_e/region_e/regcom_e.htm) (last visited June 5, 2013) ("[CRTAs] two principal duties are to examine individual regional agreements; and to consider [their] systemic implications . . .").

111. JOHN JACKSON, *WORLD TRADE AND THE LAW OF GATT* 601 (1969).

112. JAMES MATHIS, *REGIONAL TRADE AGREEMENTS IN THE GATT-WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT* 2-3 (2002).

113. See *id.* at 45.

114. See VCLT, *supra* note 104, at art. 41.

Of course, the RTAs' forum choice clauses only refer to the rights or obligations of disputing parties concerning their choice of forums. These forum choice clauses will not "affect the enjoyment by the other parties of their rights" or "the performance of their obligation" under the WTO legal texts.<sup>115</sup>

## 2. *Lex Specialis*

The application of the *lex specialis* principle in international law is supported by many scholars, litigators and international tribunals.<sup>116</sup> According to the statement of Pauwelyn, the *lex specialis* principle means that "the more special norm prevails over the more general norm" especially when *lex posterior* "do not find application, or are unable to resolve the conflict of norms."<sup>117</sup> Indeed, the *lex posterior* principle is not effective when RTAs are concluded before the formation of the WTO. For instance, the NAFTA was established in 1992<sup>118</sup> while the WTO was established in 1994.<sup>119</sup> Therefore, the forum choice clause of the NAFTA is not the later treaties but the earlier treaties compared with the WTO legal texts. Under this circumstance, the *lex specialis* principle becomes the legal basis to apply the forum choice clause of the NAFTA in WTO dispute settlement proceedings.

The WTO legal texts also recognize the *lex specialis* principle. The *lex specialis* principle could be reflected from the general interpretative note to Annex 1A, which states:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the "WTO

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115. *See id.*

116. *See* CONFLICT OF NORMS, *supra* note 45, at 385.

117. *See id.*

118. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

119. Marrakesh Agreement Establishing the World Trade Organization, art. II, 1867 U.N.T.S. 154.



Agreement”), the provision of the other agreement shall prevail to the extent of the conflict.<sup>120</sup>

This clause reveals that the member states of the WTO prefer to rely on the most close, detailed and precise expression of state consent to govern their relationship. The agreements in Annex 1 A are more special than GATT 1994 regarding the subject matter they govern. For instance, Agreement on Agriculture<sup>121</sup> more effectively and precisely stipulates the agricultural trading system, including its terms, commitment of member states and so on, compared with GATT 1994. Then, the WTO allows the priority of the Agreement on Agriculture over GATT 1994. This could be proved by the Paragraph 1 of Article 21 of Agreement on Agriculture, which stipulates that “[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.”<sup>122</sup>

From the practical experience, the WTO Appellate Body in the *EC-Bananas* case also supports the *lex specialis* principle:

Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.<sup>123</sup>

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120. Multilateral Agreements on Trade in Goods, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187.

121. Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410.

122. *See id.* art. 21.

123. Appellate Body Report, *European Communities—Regime for The Importation, Sale and Distribution of Bananas*, ¶ 204, WT/DS27/AB/R (Sept. 9, 1997).

In the *EC—Hormones* case, the WTO Panel also held the perception that the SPS Agreement should be examined firstly, compared with GATT.<sup>124</sup>

According to the *lex specialis* principle, some forum choice clauses of RTAs are more special than the jurisdiction clause under the WTO DSU because forum choice clauses of RTAs are more specific regulations regarding the choice of an appropriate jurisdiction. They, such as the forum choice clause in the NAFTA,<sup>125</sup> directly and precisely address the

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124. Panel Report, *European Communities Measures Concerning Meat and Meat Products*, ¶ 8.45, WT/DS26/R (Aug. 18, 1997).

125. See NAFTA, *supra* note 118, at art. 2005.

1. Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the General Agreement on Tariffs and Trade, any agreement negotiated there under, or any successor agreement (GATT), may be settled in either forum at the discretion of the complaining Party.

2. Before a Party initiates a dispute settlement proceeding in the GATT against another Party on grounds that are substantially equivalent to those available to that Party under this Agreement, that Party shall notify any third Party of its intention. If a third Party wishes to have recourse to dispute settlement procedures under this Agreement regarding the matter, it shall inform promptly the notifying Party and those Parties shall consult with a view to agreement on a single forum. If those Parties cannot agree, the dispute normally shall be settled under this Agreement.

3. In any dispute referred to in paragraph 1 where the responding Party claims that its action is subject to Article 104 (Relation to Environmental and Conservation Agreements) and requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

4. In any dispute referred to in paragraph 1 that arises under Section B of Chapter Seven (Sanitary and Phytosanitary Measures) or Chapter Nine (Standards-Related Measures):

(a) concerning a measure adopted or maintained by a Party to protect its human, animal or plant life or health, or to protect its environment, and

rule about how to settle overlapping disputes. However, the rule regarding overlapping jurisdictions is uncertain in the WTO DSU. The forum choice clauses of RTAs reflect the most close, detailed and precise expression of state consent regarding the issue of jurisdictional conflicts. This contractual freedom of states is also permitted by the Article XXIV of GATT 1994 as mentioned in the former part concerning the *lex posterior* principle.

According to the Article 1.2 of the DSU, the *lex specialis* principle is accepted during WTO dispute settlement proceedings.<sup>126</sup> However, the

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(b) that raises factual issues concerning the environment, health, safety or conservation, including directly related scientific matters, where the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this Agreement.

5. The responding Party shall deliver a copy of a request made pursuant to paragraph 3 or 4 to the other Parties and to its Section of the Secretariat. Where the complaining Party has initiated dispute settlement proceedings regarding any matter subject to paragraph 3 or 4, the responding Party shall deliver its request no later than 15 days thereafter. On receipt of such request, the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article 2007.

6. Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4.

7. For purposes of this Article, dispute settlement proceedings under the GATT are deemed to be initiated by a Party's request for a panel, such as under Article XXIII:2 of the General Agreement on Tariffs and Trade 1947, or for a committee investigation, such as under Article 20.1 of the Customs Valuation Code.).

*Id.*

126. See Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 35, at art. 1.2 ("2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute

*lex specialis* principle involved in the Article 1.2 of the DSU only refers to conflicts of norms within the WTO legal texts. It does not mention the applicable law issue between the WTO legal texts and legal texts of other international organizations. In order to judge whether the *lex specialis* principle could be the legal basis to apply forum choice clause of RTAs in WTO dispute settlement proceedings, it is better to analyze other WTO rules regarding the relationship between the WTO legal texts and other international laws.

The Article XXI (c) of GATT 1994 supports the priority of UN Charter concerning the “maintenance of international peace and security.”<sup>127</sup> The Article 11.3 of Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) even stipulates the rights of WTO member states “to resort to the good offices or dispute settlement mechanisms” under RTAs.<sup>128</sup> According to the Article 11.3, it is reasonable to conclude that the member states of RTAs are allowed to settle their own disputes regarding sanitary and phytosanitary measures under their own RTAs. The WTO panels or Appellate Body will recognize the jurisdiction of RTAs to the disputes based on SPS Agreement. The Article 2.2 of Trade-Related Aspects of Intellectual Property Rights (TRIPS) also mentions that “[n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne

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settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail.”).

127. General Agreement on Tariffs and Trade 1994, art. XXI, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 [hereinafter GATT 1994] (“Nothing in this Agreement shall be construed . . . (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”).

128. Agreement on the Application of Sanitary and Phytosanitary Measures, art. 11.3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 493 (“Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.”).

Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.”<sup>129</sup>

Based on the analysis above, the *lex specialis* principle is supported and practiced within the WTO legal system to settle conflicts of norms among the WTO legal texts. Based on the *lex specialis* principle, the WTO also respects some obligations and rights of its member states in other international agreements. Currently, the WTO legal texts do not explicitly stipulate the effect of *lex specialis* between jurisdiction clauses of RTAs and the WTO jurisdiction clause. According to the attitude of the WTO towards the effect of *lex specialis*, forum choice clauses of RTAs permitted by the Article XXIV of GATT 1994 could be utilized by the WTO panel or Appellate Body based on the *lex specialis* principle.

### 3. The Evidence of Forum Selection

The forum choice clauses of RTAs could also be considered as the evidence of the appropriate dispute settlement forums chosen by disputing parties themselves. The effective rules of the disputing parties, not necessarily those in the covered agreements of tribunals, are able to govern the forum selection process.<sup>130</sup> During WTO dispute settlement proceedings, the WTO panel or Appellate Body should consider the evidential effect of RTAs' forum choice clauses if disputing parties present these clauses as the evidence of their choice concerning the dispute settlement forum. These clauses are the key evidence of the dispute settlement and explicitly point out the dispute settlement forum.

Some WTO clauses reflect that the WTO will rely on the decisions and terms of other international organizations to assist its assessment. For instance, the WTO pays attention on its cooperation with the

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129. TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

130. Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 102-103 (Dec. 2) (separate opinion of Judge Fitzmaurice).

International Monetary Fund (IMF).<sup>131</sup> WTO requires its contracting parties to:

[A]ccept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES.<sup>132</sup>

The final decision of WTO contracting parties regarding the criteria of a serious decline in the contracting party's monetary reserves shall accept the determination of the IMF.<sup>133</sup> "Articles of Agreement of the International Monetary Fund" shall also be respected by WTO members.<sup>134</sup>

According to the analysis above, the decisions and terms of the IMF will assist the WTO DSB in fulfilling its obligation to "make an objective assessment of the matter before it"<sup>135</sup> if there is any dispute on the matter of exchange, monetary reserves and balances of payments. It means that the decisions and terms of the IMF function as the key evidence of WTO disputes. Forum choice clauses of RTAs could also function as the evidence of the appropriate dispute settlement forums chosen by disputing parties themselves. These forum choice clauses are permitted by Article XXIV of GATT 1994, as mentioned in the Section III(B)(1) of this article. During WTO dispute settlement proceedings,

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131. *Declaration on the Relationship of the World Trade Organization with the International Monetary Fund, Uruguay Round Agreements*, [http://www.wto.org/english/docs\\_e/legal\\_e/34-dimf\\_e.htm](http://www.wto.org/english/docs_e/legal_e/34-dimf_e.htm) (last visited Oct. 10, 2014) ("[U]nless otherwise provided for in the Final Act, the relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, will be based on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund.").

132. See GATT 1994, *supra* note 127, at art. XV, ¶ 2.

133. See *id.*

134. See *id.* art. XV, ¶ 7(b).

135. DSU, *supra* note 35, at art. 11.

they are the legal and effective evidence of the appropriate dispute settlement forums chosen by disputing parties themselves. These forum choice clauses will help the WTO panel or Appellate Body to “make an objective assessment” of the jurisdictional conflicts between the WTO and RTAs.<sup>136</sup>

Generally speaking, the *lex posterior* principle and the *lex sepcialis* principle offer WTO panels and the Appellate Body legal bases to apply forum choice clauses of RTAs to settle jurisdictional conflicts between the WTO and RTAs. WTO panels and the Appellate Body can also consider forum choice clauses of RTAs as the effective evidence of the appropriate dispute settlement forums chosen by disputing parties. Therefore, there are enough legal bases for the WTO to apply RTAs’ forum choice clauses in WTO dispute settlement proceedings.<sup>137</sup> The WTO is suggested to amend its legal texts by adding a new clause, which clearly allows WTO panels and its Appellate Body to apply the forum choice clause of a particular RTA to deal with the disputes only involving member states within that RTA when that forum choice clause is not forbidden by the WTO legal texts.<sup>138</sup>

According to the history of the GATT/WTO and the Marrakesh Agreement, the amendment of the WTO legal texts is possible because the GATT/WTO needs to update its multilateral agreements to accommodate the new development of international law. The negotiating round of trade talks in GATT/WTO “occurs permitting transformation of the basic agreements” in nearly every decade.<sup>139</sup> Article X of the Marrakesh Agreement indeed permits and offers rules for amending the WTO legal texts.<sup>140</sup> For instance, WTO members agreed the first ever amendment to the TRIPS on 6 December 2005.<sup>141</sup> The amendment specified in this article, adding a new clause to allow WTO panels and its

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136. *Id.*

137. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 35.

138. Marrakesh Agreement, *supra* note 120.

139. JOHN JACKSON, LEGAL PROBLEMS, *supra* note 19, at 94.

140. Marrakesh Agreement, *supra* note 120.

141. General Council, *Amendment of TRIPS Agreement*, WT/L/641 (Dec. 6, 2005).



Appellate Body to apply forum choice clauses of RTAs, could be accepted in the WTO legal texts in the forms of annex, understanding, or any others.

#### IV. THE FORUM CHOICE CLAUSE IN THE WTO LEGAL TEXTS

As mentioned in the former section, the application of RTAs' forum choice clauses in WTO dispute settlement proceedings is one way for the WTO to resolve its jurisdiction conflicts with RTAs. The other is the measure discussed here, stipulating a forum choice clause in the WTO legal texts. The WTO is advised to explicitly stipulate a forum choice clause to settle jurisdictional conflicts between the WTO and RTAs.

##### A. The Incentive to Stipulate A Forum Choice Clause in the WTO Legal Texts

One incentive to stipulate a forum choice clause in the WTO legal texts is that increasingly serious jurisdictional conflicts between the WTO and RTAs are hard to settle currently. This matter has been discussed in the Section I of this article and will not be repeated. As mentioned in Section II(A) of this article, many RTA provisions have already adopted forum choice clauses, which reflects the latest international tendency.<sup>142</sup> This is the other incentive and the emphasis here. This tendency has long been supported by the principle of free choice of means to settle sovereign disputes. According to the analysis below, this tendency will gradually form the new international custom for the settlement of jurisdictional conflicts and then further stimulate the WTO to stipulate the forum choice clause in its own legal text.

Many international scholars and practitioners have noticed a pronounced inflationary tendency in international law: "non law becomes soft law, soft law becomes hard law, and various customary and treaty norms become *jus cogens*."<sup>143</sup> It could be discovered from international

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142. See Gao and Lim, *supra* note 28, at 907-08; see also Kwak and Marceau, *supra* note 17, at 6; Pauwelyn, *Going Global, Regional, or Both?*, *supra* note 17, at 287-89.

143. Shelton, *Normative Hierarchy in International Law*, *supra* note 50, at 322.

practices that through the continuing conclusions and operations, a particular treaty adopted by many states “may gradually change customary law on the same subject matter so as to conform to the new treaty.”<sup>144</sup> A treaty joined by increasing states then gradually becomes conclusive evidence of customary international law practices, which will then place the whole international community including the states not affirmatively accepting that treaty under the legal obligations of that treaty.<sup>145</sup> Article 38 of the VCLT reveals the same reasoning that “nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international, recognized as such.”<sup>146</sup>

As mentioned in the Section II(A) of this article, many RTAs have stipulated forum choice clauses in their legal texts. Then, forum choice clauses have already become widespread practices of international organizations. Member states of these international organizations will apply forum choice clauses to deal with issues of jurisdictional conflicts.<sup>147</sup> According to the analysis in the former paragraph, these international practices will gradually form a new international custom of resolving jurisdictional conflicts, relying on forum choice clauses. This new custom will influence the WTO legal texts and then stimulate the WTO to add a forum choice clause in its own legal texts to settle its jurisdictional conflicts with RTAs. Kontou strengthens this statement that: “[n]ew customary law may be invoked as a ground for the termination or revision of a prior treaty.”<sup>148</sup>

The WTO also pays attentions to its relationship with other international laws. In the *US—Gasoline* case, the WTO Appellate Body considered that Article 3.2 of the DSU “reflects a measure of recognition that the [GATT 1994] is not to be read in clinical isolation from public

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144. See CONFLICT OF NORMS, *supra* note 45, at 136.

145. BURNS WESTON, RICHARD FALK & ANTHONY D’AMATO, INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM-ORIENTED COURSEBOOK 5, 76-77 (2nd ed. 1990).

146. See VCLT, *supra* note 104, at art. 38.

147. See, e.g., WT/DS241/R, *supra* note 10.

148. NACY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW 146 (1994).

international law.”<sup>149</sup> Both customs and treaties represent the consent of individual states on a particular issue, although customs are usually reflected by the implied consent of all states.<sup>150</sup> However, international laws are equally binding no matter whether they are created by explicit consent or merely by implied consent.<sup>151</sup> A new custom owns the effect of *lex posterior* and it is the latest intentions of states on the same subject matter. The amendment of WTO legal texts according to a new custom will avoid the conflict between the WTO legal texts and a new custom, and let the WTO legal texts accommodate the new development of international law.

As discussed at the end of the Section III(B)(3) of this article, the amendment of the WTO legal texts is possible. During amendment process in the WTO Ministerial Conference, the decision to submit a proposed amendment to WTO members for acceptance or to approve amendments usually shall be made by consensus, or at least a two-third majority of WTO members.<sup>152</sup> If amendments need further acceptance process, amendments shall take effect upon acceptance by at least two thirds of WTO members.<sup>153</sup> The majority voting mechanism for amending the WTO legal texts ensures that a widespread international practice already accepted by most WTO members will probably be stipulated in the WTO legal texts.

The democratic amendment process of the WTO legal texts “allow[s] all governments the chance to participate and to express” their intentions.<sup>154</sup> A widespread international practice means that more states including WTO members accept this practice. And then this practice more easily gets enough votes from WTO members to become the amendment to the WTO provisions. As mentioned in the Section II(A) of

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149. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline* ¶ 17, WT/DS2/AB/R (Apr. 29, 1996).

150. ANTONIO CASSESE, *INTERNATIONAL LAW* 119 (2001).

151. See *CONFLICT OF NORMS*, *supra* note 45, at 96; see also BARON MCNAIR, *THE LAW OF TREATIES* 64 (1961).

152. See Marrakesh Agreement, *supra* note 120.

153. *Id.*

154. Oscar Schachter, *Entangled Treaty and Custom*, in Yoram Dinstein and Mala Tabory, in *INT’L LAW AT A TIME OF PERPLEXITY—ESSAYS IN HONOUR OF SHABTAI ROSENNE* 720 (Yoram Dinstein ed., 1998).

this article, many WTO members support to apply forum choice clauses to settle jurisdictional conflicts, which becomes a widespread international practice.<sup>155</sup> Accordingly, WTO members are able to encourage the WTO to stipulate a forum choice clause based on this widespread international practice.

#### B. The Advantage to Stipulate A Forum Choice Clause in the WTO Legal Texts

If the WTO stipulates a forum choice clause in its legal texts, jurisdictional conflicts between the WTO and RTAs will be fundamentally resolved. The amendment suggested in Section III of this article, the application of RTAs' forum choice clauses in WTO dispute settlement proceedings, endows WTO panels or the Appellate Body the right to apply forum choice clauses of RTAs. The amendment suggested in this section makes the application of a forum choice clause more directly in WTO dispute settlement proceedings. If there is a forum choice clause in the WTO legal texts, WTO panels or the Appellate Body will have to apply a forum choice clause. The reason is that this forum choice clause has already become the treaty obligation of WTO panels or the Appellate Body.

A forum choice clause written in the WTO legal texts will be "easier to prove and identify."<sup>156</sup> The written text of treaties "brings clarity and precision."<sup>157</sup> This is the reason why most international tribunals would like to apply treaty laws rather than other sources of international law. International tribunals prefer applying treaty norms because of "the much greater precision and ease of determination of content and range of validity in the case of conventional rules and, in consequence, the much stronger, by comparison with other rules, persuasive impact for the Court and the parties."<sup>158</sup>

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155. See *supra* note 32.

156. See CONFLICT OF NORMS, *supra* note 45, at 134.

157. Schachter, *supra* note 154.

158. KAROL WOLFKE, CUSTOM IN PRESENT INT'L LAW 93 (Wroclawskie Wydawnictwo Naukowe, Wroclaw eds., 1964).

As the international tribunal, WTO panels or the Appellate Body also would like to depend on their own legal texts to settle disputes brought before them. If a forum choice clause is part of the WTO legal texts, WTO panels or the Appellate Body will observe such a clause and apply it to settle its jurisdictional conflicts with RTAs. Jennifer agrees that:

the best solution would be for WTO members to use the Doha negotiating mandate regarding RTAs to resolve the legal relationship between these agreements and the WTO, and to establish clear rules for addressing conflicts and overlaps between the dispute settlement mechanisms of the two.<sup>159</sup>

According to the opinion of this article, the forum choice clause of the WTO is suggested to follow the model of exclusive forum clauses adopted in many successful RTAs. For instance, paragraph 6 of Article 2005 of the NAFTA mentions that “[o]nce dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other.”<sup>160</sup> Exclusive forum choice clauses are effective measures to settle jurisdiction conflicts between international tribunals and are able to clearly justify an appropriate dispute settlement forum when jurisdictional conflicts happen. Currently, they are also the popular clauses to deal with the matter of overlapping jurisdictions. Besides the NAFTA’s exclusive forum clause and exclusive forum clauses mentioned in Section II(A) of this article, other instances of these

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159. Hillman, *supra* note 12, at 205.

160. NAFTA, *supra* note 118, at art. 2005.6.

clauses are in EC—Mexico free trade agreement,<sup>161</sup> ASEAN—Korean free trade agreement,<sup>162</sup> and so on.

Following the model of exclusive forum clauses, the forum choice clause of the WTO is recommended to stipulate that once the dispute settlement proceeding under the DSU or any other dispute settlement mechanism of a RTA established under the Article XXIV of GATT 1994 has been involved with respect to any dispute, the forum selected by the complaining party shall be used to the exclusion of any other for that dispute.<sup>163</sup> Of course, there are two preconditions for the application of the WTO's exclusive forum clause. One precondition is that the parties to that particular dispute are the same under both the WTO dispute settlement proceeding and the dispute settlement mechanism of that RTA. The other is that the parties to that particular dispute are the member states of both the WTO and that RTA.

According to the proposed exclusive forum clause in the WTO legal texts, the situation that forum exclusion provisions of RTAs are obsolete in terms of preventing disputing parties from initiating other dispute mechanisms will be avoided. The WTO panel or Appellate Body used to take over the case since they consider it their right to decide matters within their own jurisdiction.<sup>164</sup> In *Mexico—Taxes on Soft Drinks* case,

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161. See 2001 O.J. (L 70/7) 153 (“Recourse to the dispute settlement provisions of this Title shall be without prejudice to any possible action in the WTO framework, including dispute settlement action. However, where a Party has, with regard to a particular matter, instituted a dispute settlement proceeding under either Article 39(1) of this Title or the WTO Agreement, it shall not institute a dispute settlement proceeding regarding the same matter under the other forum until such time as the first proceeding has ended.”).

162. See Agreement on Dispute Settlement Mechanism under the Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea, art. 2, ¶ 5, Dec. 13, 2005 (“Once dispute settlement proceedings have been initiated under this Agreement or under any other treaty to which the parties to a dispute are parties concerning a particular right or obligation of such Parties arising under the covered agreements or that other treaty, the forum selected by the complaining party shall be used to the exclusion of any other for such dispute.”).

163. See *supra* notes 33 and 34.

164. See Appellate Body Report, United States—Anti-Dumping Act of 1916, ¶ 54, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000).

the WTO Panel was of the opinion that “under the DSU, it ha[d] no discretion to decide whether or not to exercise its jurisdiction in a case properly before it.”<sup>165</sup> In respect of jurisdictional conflicts between the WTO and NAFTA, the Appellate Body then argued that “[i]t is difficult to see how a panel would fulfill that obligation if it declined to exercise validly established jurisdiction and abstained from making any finding on the matter before it.”<sup>166</sup> That is the key reason why the WTODSB insists on its own jurisdiction when it is in a jurisdictional conflict with a RTA.

The proposed exclusive forum clause in the WTO legal texts offers the WTO panel or Appellate Body enough legal ground for the objection to admissibility<sup>167</sup> if one particular case has already been settled or is being settled by the DSM of a RTA. Based on the proposed exclusive clause in the WTO legal texts, the WTO panel or Appellate Body will no longer insist on its jurisdiction on a dispute already settled or being settled by the DSM of a RTA. The proposed exclusive forum clause in the WTO legal texts stipulates that once the dispute settlement proceeding under the DSU or any other dispute settlement mechanism of a RTA established under the Article XXIV of GATT 1994 has been involved with respect to any dispute, the forum selected by the complaining party shall be used to the exclusion of any other for that dispute. Although WTO panels or its Appellate may refuse to settle a dispute before it, they do not violate their obligations under the DSU because of the proposed exclusive forum clause.<sup>168</sup>

If there is an exclusive forum clause in the WTO legal texts, a disputing party will not seek refuge from another DSM to achieve its desired outcome because the former DSM’s decision is unfavorable. In the *Argentina—Poultry* case, Brazil re-litigated the same dispute in the

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165. WT/DS308/R, *supra* note 27, at ¶ 7.18.

166. WT/DS308/AB/R, *supra* note 9, at ¶ 51.

167. See *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 177 (Nov. 6) (The ICJ has well developed the theory about admissibility and interprets it in the *Oil Platforms* case as follows: “Objections to admissibility [‘recevabilité’] normally take the form of an assertion that, even if the Court has jurisdiction and the facts stated by the applicant State are assumed to be correct, nonetheless there are reasons why the Court should not proceed to an examination of the merits.”).

168. See *supra* notes 33 and 34.

WTO DSB because the award of the MERCOSUR tribunal is undesirable. Argentina, of course, opposed the WTO Panel's exercise of jurisdiction and requested that "in light of the prior MERCOSUR proceedings, the Panel refrain[ed] from ruling on the claims raised by Brazil in the present WTO dispute settlement proceedings."<sup>169</sup> The WTO Panel dismissed Argentina's suggestions because the WTO Panel considered that "there [was] no basis for a WTO panel to apply the principle of estoppel."<sup>170</sup>

The proposed exclusive forum clause in the WTO legal texts will become the legal ground for a WTO panel or its Appellate Body to refrain from ruling on the claims already settled in the DSM of a particular RTA. According to the proposed exclusive forum clause, if the dispute settlement proceeding under the dispute settlement mechanism of a RTA has been involved with respect to a particular dispute, such forum selected by the complaining party shall be used to the exclusion of any other for that dispute, including the WTO DSB.<sup>171</sup> Therefore, the involved disputing parties will not rely on the WTO DSB to achieve its desired outcome even though they do not satisfy the award of the RTA's DSM. The WTO DSB will also refrain from ruling on the claims already settled in the RTA's DSM.

It is not only beneficial but also necessary to require the WTO to follow the model of exclusive forum clauses already adopted in many RTAs. Under this circumstance, the forum chosen for settling the overlapping dispute is the same, no matter whether the forum is chosen according to the WTO's exclusive forum clause or the exclusive forum clauses of those RTAs.<sup>172</sup> For instance, if a disputing party first brings a dispute to the tribunal under a RTA, the exclusive forum clauses of the WTO and that RTA will both justify the tribunal under that RTA to be the dispute settlement forum as discussed in the former part of this section. Consequently, jurisdictional conflicts between the WTO and RTAs are avoided.

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169. WT/DS241/R, *supra* note 10, at ¶ 7.17.

170. *Id.*

171. See notes 33 and 34.

172. *Id.*



The proposed exclusive forum clause in the WTO legal texts will reduce the waste of the cost and time caused by parallel proceedings concerning the same dispute and avoids inconsistent awards.<sup>173</sup> In the *Brazil—Retreaded Tires* case, the WTO Panel recommended the Brazil to bring the inconsistency of the MERCOSUR exemption into conformity with the requirements of the chapeau of the Article XX.<sup>174</sup> However, the application by Brazil of MERCOSUR exemption is in response to the ruling of a MERCOSUR panel and it is the Brazil's obligation under MERCOSUR.<sup>175</sup> Disputing parties will face difficulties to implement the overlapping awards when the recommendations of the overlapping awards are contrary. The proposed exclusive forum clause allows the WTO DSB to give up its jurisdiction when such dispute is being or already settled by the RTA's DSM with an exclusive jurisdiction. That is the convenience to disputing parties, which reduce the risk of disputing parties to implement double awards of both the WTO DSB and the RTA's DSM.

## V. CONCLUSION

Jurisdictional conflicts between the WTO and RTAs are more and more serious because RTAs continue to blossom. The forum choice clause is considered by this article as an effective and fundamental measure to resolve these jurisdictional overlaps. This measure directly aims at resolving the lack of a forum choice clause in WTO legal texts, which is the main causation of jurisdictional conflicts between the WTO and RTAs. The suggestion of this article is to amend the WTO legal texts to offer WTO panels or its Appellate Body a forum choice clause in WTO dispute settlement proceedings. This amendment ensures that WTO panels or its Appellate Body has the legal ground in the WTO legal texts to apply a forum choice clause to settle jurisdiction conflicts between the WTO and RTAs. However, pertinent general principles of international law are not stipulated in the WTO legal texts. Whether to

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173. See notes 12 and 15.

174. See WT/DS332/R, *supra* note 8.

175. See *id.* ¶ 2.5(e).

apply these principles to settle these jurisdictional conflicts is only the discretion of WTO panels or its Appellate Body.

There are two ways to offer a forum choice clause in WTO dispute settlement proceedings. One way is to add a new clause in the WTO legal texts. This clause will allow WTO panels or its Appellate Body to apply the forum choice clause of a particular RTA to settle jurisdictional conflicts between the WTO and that RTA. The *lex posterior* principle, the *lex specialis* principle, and the forum choice clause considered as the evidence of the appropriate dispute settlement forum chosen by disputing parties themselves are the legal bases to support this kind of amendment. The other way is to directly stipulate an exclusive forum clause in the WTO legal texts. Based on this amendment, WTO panels or its Appellate Body will have to rely on this exclusive forum clause to settle jurisdictional conflicts between the WTO and RTAs because this clause has already become the treaty obligation of WTO panels or its Appellate Body. Consequently, this method will fundamentally settle jurisdictional conflicts between the WTO and RTAs.